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May 23, 2001

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: *Ex Parte* Communication In the Matter of Review of the Commission's  
Rules and Policies Affecting the Conversion to Digital Television (MM  
Docket 00-39); and In the Matter of Carriage of the Transmissions of  
Digital Television Broadcast Stations (CS 98-120).

Dear Ms. Salas:

On Tuesday, May 22, 2001, Lawrence R. Sidman and Sara W. Morris of Verner, Liipfert, Bernhard, McPherson & Hand; and David H. Arland of Thomson Multimedia, Inc. ("Thomson") participated in a meeting met with the Commission staff listed below to discuss issues related to the transition to digital television ("DTV"). The discussion focused specifically on the Commission's consideration of forced integration of DTV reception capability, cable compatibility with DTV receiver equipment, and DTV copy protection.

Mass Media Bureau: Robert Ratcliffe, Rick Chessen, Susannah Zwerling, Jimella Johnson, Keith Larson

Office of Engineering & Technology: Bruce Franca, Alan Stillwell

Office of Plans & Policy: Robert Pepper, Amy Nathan and Jonathan Levy

Cable Services Bureau: Bill Johnson, Eloise Gore, Tom Horan, Deborah Klein, Royce Dickens, John Wong

The discussion tracked comments and reply comments filed by Thomson in these proceeding, as well as points addressed in the attached position papers, which were distributed at the meeting.

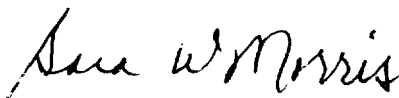
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In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, an original and one copy of this letter, including attachments, are being filed with your office. Please direct any questions concerning this matter to the undersigned.

Respectfully Submitted,

A handwritten signature in black ink, reading "Sara W. Morris". The signature is written in a cursive, flowing style.

Sara W. Morris  
Telecommunications Consultant

cc (without enclosures):

Robert H. Ratcliffe  
Rick Chesson  
Keith Larson  
Susanna Zwerling  
Jamila B. Johson  
Robert Pepper  
Amy Nathan  
Jonathan Levy  
Bruce Franca  
Alan Stillwell  
Bill Johnson  
Eloise Gore  
Deborah Klein  
John Wong  
Tom Horan  
Royce Dickens

## **Forced Integration of DTV Reception Electronics Would Harm Consumers And Not Advance The DTV Transition**

- **Consumers Must Be Free To Choose For Themselves How, When, And At What Price They Will Make The Transition To DTV.** As the FCC recently recognized, manufacturers are offering consumers a flexible and growing array of DTV products at rapidly decreasing prices. The momentum building behind these successful efforts, however, will vanish if manufacturers are saddled with government mandates that drive up costs and drive away investment in innovation. The ability of consumers to make the transition to DTV on their own terms – not the government’s – is an essential ingredient to consumer acceptance of DTV and ultimately the success of the transition.
- **The Costs Associated With An Across-the-Board DTV Tuner Mandate Would Amount to A Regressive, Anti-Consumer “DTV Tax” That Would Slow, Not Speed, the Transition.** Forced integration of DTV reception capability would add at least \$200 to \$300 to the retail price of every TV – and would at least double the average selling price of the industry’s most popular screen size televisions – if required in the next two years.
- **Forced Integration of DTV Reception Cannot Credibly Be Compared – In Terms of Technical Complexity, Cost or Societal Value – With the V-Chip or Closed Captioning.** Unlike the integration of V-chip and closed captioning technologies, each of which involved only modifications of a single IC control chip, adding DTV reception capability to television receivers is by no means a simple task. It is an extensive and costly undertaking involving numerous components, software, computer memory and IC chips. Moreover, unlike the V-chip and closed captioning, which the government required to promote specific social goals, forced integration of DTV reception capability into every television receiver will serve no extrinsic social goal. Similarly, when Congress mandated UHF reception in all television receivers in 1962, the added cost was minimized by the fact that UHF reception did not require the introduction of a *new* technology, but rather, simply an extension of the products’ tuning range. DTV reception is an entirely different matter, involving many more components computer memory and decoding chips.
- **Assertions That An Across-The-Board Reception Mandate Will Create Economies of Scale That Reduce Additional Costs Down To \$60 Or Less Are Simply False And Ignore Both The Complexities Of DTV Technology And The Realities Of The Consumer Electronics Marketplace.** Economies of scale are *reached over time*, not created instantaneously. Today’s low-cost TV receivers are the product of sixty years of cost reductions and technological advances. Moreover, economies of scale depend on high volume production and sales of products. As across-the-board mandate could virtually eliminate the profitable development and sale of many small screen, affordable TV products, effectively leaving consumers with fewer choices and higher prices and no other options.
- **Availability of Content and Cable Compatibility Will Drive Consumer Sales of DTVs.** Over the longer term, economies of scale in fact ultimately *will* drive down DTV reception costs. Over the longer term, as sales of DTV receivers grow, economies of scale will develop and prices for DTV reception electronics will drop significantly. How fast this occurs – whether in four years or forty – depends upon (1) greater quantity of unique, high quality DTV programming, including over cable; (2) final agreement on DTV-cable compatibility “build-to” specifications; and (3) adoption of DTV copy protection systems that are not overly burdensome on consumers.
- **Consumer Advocates Agree: Forced Integration of DTV Tuners Will Harm Consumers.** The Consumer Federation of America, the Massachusetts Consumers’ Coalition and The Seniors Coalition have raised *serious concerns* about the effect of a DTV tuner mandate on the price of television receivers and have urged that such a mandate is unwarranted, particularly given its effect on consumers, especially low-income groups, including senior citizens, and their access to news and information.

## THE COMMISSION'S CONCLUSION THAT ACRA GRANTS IT THE AUTHORITY TO IMPOSE A DTV RECEPTION REQUIREMENT IS WRONG AS A MATTER OF LAW

Congress, the Commission, and the courts have interpreted ACRA as conveying nothing more than the specific authority to promote the viability of UHF broadcasting. Moreover, even among those who would like to read ACRA broadly, there is a recognition that in the absence of a specific statutory directive addressing digital tuners, the Commission lacks authority to require that all tuners receive DTV channels. Consequently, the Commission's determination that it has the authority under ACRA to require that television receivers be capable of adequately receiving digital broadcast signals is misplaced and should be reversed on reconsideration.

- **Congress Adopted ACRA For the Narrow Purpose of Ensuring the Viability of UHF Television.** The tools of statutory construction – particularly legislative history and Congressional purpose – demonstrate that Congress unequivocally did not intend for ACRA to apply in the broad manner the Commission implicitly concludes it does in its DTV Biennial Review *Report and Order*. Congress enacted ACRA in 1962 (when DTV technology was mere science fiction) for the sole purpose of ensuring the viability of UHF broadcasting. The ACRA's legislative history, evidenced particularly in the Senate Report accompanying the legislation, fully supports this conclusion. It is difficult to imagine any reviewing court accepting a legal construction of ACRA which ignores the only intent Congress had – and could have had – when it enacted the legislation.
- **The Plain Text of ACRA Requires All Televisions to Receive All Analog Television Frequencies, Not All Technologies.** Arguments that the ACRA's reference to "all frequencies" by its definition includes DTV frequencies are unavailing. The Supreme Court has stated: "words, unless otherwise defined, will be interpreted as taking their ordinary, contemporary, common meaning." See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (viewing the term "bribery" as used in the Travel Act of 1961). The term "all frequencies" must be given the meaning it held at the time of Congress' enactment. *Id.* at 42 ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute."). In 1962, the words "all frequencies" encompassed VHF and UHF technology – digital technology was mere science fiction. Thus, it is pure fantasy to argue that digital technology is encompassed by the term "all frequencies." In fact, all television receivers manufactured and marketed by Thomson today comply fully with the outermost boundaries of the plain language of the analog-based ACRA – they are capable of receiving all analog television broadcast signals transmitted on all frequencies. Forced integration of digital reception capability does not only require TV sets to receive all television broadcast *frequencies*, but rather "*all technologies*." But ACRA speaks only to frequencies, not technologies. Accordingly, a plain language reading of ACRA does not cover digital technology and fails to provide a legal basis for the Commission's imposition of a forced integration requirement on manufacturers.
- **Congress's Unambiguously Expressed Intent in Enacting ACRA, As Evidenced in Its Legislative History and Congressional Purpose, Dictates Its Application Only to Analog Technology.** Pursuant to the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*, if the intent of Congress is clear, an agency "must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Significantly, intent is not dependent on the plain language of a statute, but by "employing traditional tools of statutory construction," a precedent strictly adhered to by the U.S. Court of Appeals for the D.C. Circuit. *Id.* at 843 Note 9. The Commission, in asserting its authority under ACRA to force integration of DTV reception in all televisions, appears to focus exclusively on the text of ACRA. However, an examination applying ACRA's legislative history, structure and purpose reveals indisputably that that Congress did not intend for ACRA to apply in the broad manner the Commission claims. To the contrary, utilizing accepted tools of statutory construction, there is no question that Congress intended to solve one narrow problem that existed 40 years ago: receipt of analog UHF channels. That problem, and Congress' narrowly targeted solution, ACRA, had nothing to do with digital television. Accordingly, under *Chevron*, there is no room for interpretive latitude for the FCC to apply ACRA to a technology – DTV – that did not exist when it

was enacted. Entreaties by the Commission and virtually all proponents of forced integration of DTV that Congressional action is needed, at a minimum, to clarify the Commission's authority under ACRA, greatly undermine any claim of existing authority.

- **The “Circumstances and Factors” That Led to ACRA’s Enactment Were Distinctly Different From Those Affecting the DTV Transition.** Broadcasters and the Commission have suggested that ACRA’s legislative history supports forced integration simply because the “circumstances and factors” that led Congress to enact ACRA purportedly resemble those that exist today. In fact, the “circumstances and factors” argument is neither a legally-recognized tool of construction, nor a precedent the Commission should set. However, even assuming, *arguendo*, that the “circumstances and factors” argument as posed by broadcasters had weight, it would fail on the facts. Unlike the DTV transition, the government-directed resuscitation of UHF television in 1962 was not a “unique transition of the entire television system” (most obviously it in no way affected VHF broadcasters, aside perhaps from a competitive standpoint). Moreover, the technology cost involved in adding UHF capability to all receivers was relatively simple and by no means as complex and expensive as including digital reception capability. Additionally, while lawmakers may have been willing to accept and justify slightly higher consumer prices for television receivers to implement the larger public policy goal of bolstering use of the UHF band, there is no evidence Congress would ever have countenanced doubling or tripling consumer prices for the most popular sizes of television receivers, as would be the case with forced integration of DTV reception. Finally, to suggest – as broadcasters do – that analog spectrum reclamation drove Congress in 1962 to enact ACRA, is simply wrong.
- **The Commission Itself Has Previously Recognized Its Narrow Authority Under ACRA With Regard to New Technologies.** The Commission’s decision in *Sanyo Manufacturing Corporation* demonstrates the Commission’s own view that devices designed to receive *new technologies* fall outside the scope of ACRA. In that case, the Commission noted that the signal sources used by the video display device at issue were products of *technologies that did not exist at the time that the statute was enacted* and, accordingly, concluded the device...involved fell outside the scope of ACRA because “we are not dealing with a technology that poses any real threat to use of UHF spectrum.” *Sanyo Manufacturing Corp.*, 58 Rad. Reg. 2d (P & F) 719 (1985) (decision on reconsideration of *Sanyo Manufacturing Corp.*, 56 Rad. Reg. 2d (P & F) 681 (1984)). A television receiver that is manufactured without the capability of receiving DTV signals does not pose any threat to UHF reception and, accordingly, falls outside the scope of ACRA. Notably, the Commission, in its *Sanyo* decision, also stressed that the concern of Congress in enacting ACRA was to “remedy a situation where the UHF television allocations were progressively being rendered less useful because fewer and fewer television sets could receive anything but the VHF channels.” *Id.* While some have expressed concern about the availability, on an overall percentage basis, of non-DTV-capable “DTVs” vis-à-vis those with integrated reception capability, the Commission itself (in its April 19<sup>th</sup> DTV Transition Update) recently has remarked that sales of all DTV products, including those with DTV reception, are *increasing*.
- **The Courts Have Recognized the Limitations of the Commission’s Authority Under ACRA.** In *Electronic Industries Association Consumer Electronic Group v. FCC*, the United States Court of Appeals for the District of Columbia considered the Commission’s scope of authority under ACRA. 636 F.2d 689 (1980). Relying extensively on the Act’s legislative history, which it described as “clearer than most,” the court concluded that Congress left to the Commission the task of achieving a single goal: improving “UHF Service to make that band competitive with VHF.” *Id.* at 695. In addition, the court also noted that the statute was only adopted after the Commission explicitly committed that it would “avoid extreme or unreasonable performance specifications,” and “select standards which are in the realm of the average characteristics of UHF receivers available on the open market today.” *Id.* at 696. The court’s interpretation of ACRA is consistent with Thomson’s argument that ACRA confines the Commission’s authority to a specific problem, a specific context and a specific time. A contrary construction by the Commission today could not withstand judicial review.